No. 10519 Cr.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

NATHANIEL WINSTON HENDERSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF.

AMES PETERSON,
925 L. A. Stock Exchange Building, Los Angeles,
WILLIAM B. BEIRNE,
904 Washington Building, Los Angeles,
Attorneys for Appellant.

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

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I.

Appellant's Reply to Appellee's Objections to Appellant's Specification of Errors.

Appellee does not attempt to discuss the merits of appellant's specification of errors based upon the trial court's denial of appellant's motion for a directed verdict of acquittal, as set forth on pages 9 and 10 of appellant's opening brief, nor the argument presented in connection with that specification on pages 11 to 19, inclusive, of said brief, but instead invokes what was formerly known as Rule 11 of the Rules of the United States Circuit Court of Appeals for the Ninth Circuit, and asks this Court to refuse to consider the assignment of error upon which that specification is based, because, as is asserted, appellant has failed to comply with the requirements of that rule. What was formerly Rule 11 is now a part of the Court rules and is contained in a paragraph headed, "Assignment of Errors" under the heading, "Criminal Appeals." The portions of the rule upon which appellant

relies are subdivisions "b" and "d" thereof, which read as follows:

> "(b) When the error alleged is to the admission or the rejection of evidence, the assignment of errors shall quote the grounds urged at the trial for the objection and the exception taken and the full substance of the evidence admitted or rejected."
>
> "(d) Such assignment of errors shall form part of the transcript of the record and be printed with it. When this is not done, counsel will not be heard thereon except at the request of the court; and errors not assigned according to this rule will be disregarded, but the court, at its option, may notice a plain error not assigned."

Appellee argues that the rule requires "the full substance of the evidence admitted or rejected," to be contained in the assignment. While this is undoubtedly true where the error alleged is the admission or rejection of evidence, yet it certainly can not be the rule where the assignment is based upon the court's denial of a motion for a directed verdict of not guilty, since that would require a repetition of all the evidence contained in the bill of exceptions. But, conceding that the rule has not been complied with, either in the assignment based upon the denial of the motion for a directed verdict of not guilty or in the assignment based upon the Court's error in allowing in evidence testimony of similar offenses, the question is whether this Court may consider the errors complained of even though they be improperly or defectively assigned.

It will be noted that the rule itself contains a qualification which gives the court the right to consider such error. In subdivision (d) of the Rules, it is provided that "the court at its option, may notice a plain error not assigned." That exception to the general rule has been

interpreted and applied in numerous cases. The courts have held that that exception is as old as the rule itself, and it gives the court the right in criminal cases, where the life or liberty of a citizen is at stake, to give consideration to errors substantially prejudicing the rights of a defendant, even where such error was not properly raised by objection, exception, request, or assignment. We quote from the case of *McNutt v. United States*, 267 Fed. 670, where this matter is discussed.

> "The United States attorney meets his (appellant's) brief and argument with the objection that because there were no objections or exceptions to any of the evidence, or any of the rulings of the court at the trial, there is nothing here for this court to consider or review and the judgment must be affirmed. *Such is undoubtedly the general rule, but there is an exception to it as firmly established as the rule itself. It is that in criminal cases, where the life or liberty of the citizen is at stake, the courts of the United States in the exercise of a sound discretion, may notice and relieve from radical errors in the trial which appear to have been seriously prejudicial to the rights of the defendant, although the questions they present were not properly raised or preserved by objection, exception, request, or assignment of error.* Wiberg v. United States, 163 U. S. 632, 658, 16 Sup. Ct. 1127, 41 L. Ed. 289; Weems v. United States, 217 U. S. 349, 363, 30 Sup. Ct. 544, 54 L. Ed. 793, 19 Ann. Cas. 705; Sykes v. United States, 204 Fed. 909, 914, 123 C. C. A. 205, 210; August v. United States, 247 Fed. 388, 392, 168 C. C. A. 428, 432; Fielder v. United States, 227 Fed. 832, 833, 142 C. C. A. 356, 357." (Italics ours.)

In *Robinson v. United States*, 290 Fed. 55, the defendant was convicted of conspiracy to violate the National Prohibition Act. It was contended by the Govern-

ment that error had not been properly assigned. In discussing this contention the court said:

> "No claim was made in the court below that the government had failed to prove the alcoholic content of the whisky; no request to charge upon the subject was made; neither was any motion to dismiss upon the ground made; and there is no assignment of error upon that ground. Nevertheless upon the argument in this court the point was raised. The assignment of errors has been said to be the cause of action in the appellate court, and where none is filed there is nothing for the court to act upon. Henderson v. Halliday, 10 Ind. 24. It is in effect the appellant's complaint in the appellate court, and resembles the initial pleading in the lower court. 2 Encyc. of Pleading and Practice, 921. But in criminal cases the courts have not always confined themselves to the errors assigned, but have often examined the record generally in the interests of justice; and in some states by statute no assignment of errors in criminal cases is required. *Id.* 929.
>
> "The Supreme Court in a criminal case, Wiborg v. United States, 163 U. S. 632, 658, 16 Sup. Ct. 1127, 1137 (41 L. Ed. 289), where the error committed had not been called to the attention of the trial court, said:
>
> 'And although this question was not properly raised, yet if a plain error was committed in a matter so absolutely vital to defendants, we feel ourselves at liberty to correct it.'
>
> "So in Crawford v. United States, 212 U. S. 183, 194, 29 Sup. Ct. 260, 264 (53 L. Ed. 465, 15 Ann. Cas. 392), the court again referred to this subject and said:
>
> 'In criminal cases courts are not inclined to be as exacting, with reference to the specific character of the objection made, as in civil cases. They will,

in the exercise of a sound discretion, sometimes notice error in the trial of a criminal case, although the question was not properly raised at the trial by objection and exception.'

"Again in Weems v. United States, 217 U. S. 349, 362, 30 Sup. Ct. 544, 54 L. Ed. 793, 19 Ann. Cas. 705, the matter was referred to, and the court in a criminal case declared that it would consider an assignment of error which was made for the first time in that court—the right asserted being of such high character as to find expression and sanction in the Constitution.

"The act of February 26, 1919 (40 Stat. 1181 (Comp. St. Ann. Supp. 1919, 1246) amending section 269 of the Judicial Code, provides as follows:

'On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions, which do not affect the substantial rights of the parties.'

"While this statute may not be mandatory, compelling the courts to consider in all cases errors not assigned (Thompson v. United States (C. C. A.) 283 Fed. 895, 897), it certainly granted to the courts the statutory right to consider errors not assigned or specified. In view of the statute we shall consider the question raised that the record does not disclose that the whisky herein involved contained 'one-half of 1 per centum or more of alcohol by volume which are fit for use for beverage purposes' as provided in the National Prohibition Act."

In *Humes v. United States,* 182 Fed. 485, at 486, the court used the following language:

"It is quite doubtful if there is a sufficient exception or assignment of error to compel consideration

> of this question; *but, as it is vital to the defendant in a case in which personal liberty is involved, we are disposed under the authority of* Wiborg v. United States, 163 U. S. 632, 16 Sup. Ct. 1127, 1197, 41 L. Ed. 289, Clyatt v. United States, 197 U. S. 207, 25 Sup. Ct. 429, 49 L. Ed. 726, and Crawford v. United States, 212 U. S. 183, 29 Sup. Ct. 260, 53 L. Ed. 465, *not to pass it by.*" (Italics ours.)

Peru v. United States, 4 Fed. (2d) 881, involved the question of the introduction of evidence in violation of the "search and seizure" amendment to the Constitution. It was claimed that the defendant's motion to instruct a verdict had been waived by introducing a defense and failing to renew the motion at the end of the case. In this connection the court said:

> "The motion to instruct a verdict as to Bird on count 5 made at the close of government's case, should have been sustained. Whether this was waived by proceeding with the defense and the failure to renew the motion at the close of the evidence need not be determined, as *a conviction of crime with no evidence to support it whatever presents upon the whole record such a palpable and manifest error as warrants the appellate court in considering it, even if there be no assignment of such error, as is contended here.*" (Italics ours.)

In the case of *Skuy v. United States,* 261 Fed. 316, the defendant was convicted of perjury. It was the contention of the Government that the errors claimed should not be considered by the court because no proper exceptions or objections had been made or taken. The court said:

> "The contention that proper objections were not made, and proper exceptions were not taken, to permit the consideration in this court of the issues which have been discussed, has not escaped attention,

but it fails to convince. Hall v. U. S., 150 U. S. 76, 80, 82, 14 Sup. Ct. 2, 37 L. Ed. 1003; Waldron v. Waldron, 156 U. S. 361, 380, 381, 382, 15 Sup. Ct. 383, 39 L. Ed. 453. *And even if it were tenable, this is a trial for an alleged crime, it involves the liberty of the citizen, and the fault in the trial is so radical that it may well be noticed and corrected by this court without objection, exception, or assignment.* Wiborg v. United States, 163 U. S. 632, 659, 16 Sup. Ct. 1127, 1197, 41 L. Ed. 289; August v. United States, 257 Fed. 388, 391, 393, ... C. C. A. ....." (Italics ours.)

Paris v. United States, 260 Fed. 529, cited in our opening brief on another point, was a conviction for violation of the Harrison-Anti-Narcotic Act. One of the errors assigned was the admission of evidence of other offenses, and the Government objected to a consideration of that point because the substance of the evidence was not set forth. In discussing this contention the court said:

"Counsel argue that the sixth assignment of error, on which the challenge of the evidence relative to the Tulsa transaction rests is insufficient because it fails to set forth the substance of the evidence erroneously admitted, as required by rule 11 of this court (188 Fed. ix, 109 C. C. A. ix). But the assignment clearly states that the error to which it is directed is the admission over the objection and exception of the defendants of the testimony of a witness that the defendant was caught with the bottles of morphine in his possssion at Tulsa, in the Eastern district of Oklahoma, a long time previous to his apprehension and arrest in the Western district. This assignment may not constitute a strict technical compliance with the literal terms of rule 11, but it accomplished the object of that rule; it gave fair notice to counsel and court of the claim of error which

has been discussed, for the record contained evidence concerning only one transaction, and at only one time, when at Tulsa the defendant was caught with bottles of morphine. *This is an important case to the defendant. It involves his imprisonment, his deprivation of liberty, for 2 years. The counsel for the United States have not been misled regarding, or ignorant of the claim of error to which this assignment points, and this court is unwilling to disregard it on account of the harmless defect in the assignment."* (Italics ours.)

In *Ayers v. United States,* 5 Fed. (2d) 607, no sufficient motion for a directed verdict was made and there was no proper assignment of the denial of that motion. On appeal, however, the court considered the sufficiency of evidence despite the defect in the assignment, applying the exception to the general rule. The court stated that the appellant had been convicted of an offense which the evidence had completely failed to show he had committed, and said that the error was too plain and vital to be overlooked.

In the following cases the courts applied the exception to the rule, considering the sufficiency of the evidence even where no motion for a directed verdict had been made by appellant.

Williams v. United States, 66 Fed. (2d) 868;
Lewis v. United States, 92 Fed. (2d) 952;
Crabb v. United States, 99 Fed. (2d) 325.

And in this circuit this Court has considered grave error despite the failure of the appellant to properly preserve and present the error in connection with the rule. see *Morrisey v. United States,* 67 Fed. (2d) 267.

Under the rule of this court that the court "at its option" may notice a plain error not assigned and in

view of the decisions hereinabove cited, we believe that this is a case in which the errors are so grave and so vital to the appellant that this court should, in the exercise of the discretion vested in it, consider such errors regardless of any defect in their presentation. This case is one which contains all of the requirements necessary for the application of the exception to the general rule; it is a criminal case, one involving the liberty of the appellant—the sentence imposed being five years in the penitentiary, the maximum term prescribed by the statute, and the error is plain, grave and manifestly prejudicial to the substantial rights of appellant. The error which the Government claims was not properly assigned was the denial of appellant's motion for a directed verdict of not guilty. This involves the question of the sufficiency of the evidence. Even if it be conceded that this assignment is defective, still, neither the court nor counsel could possibly be misled or put to any inconvenience thereby, since under our specification of errors on this point, as set forth in our opening brief, pages 9 and 10, the details of the insufficiency are clearly set forth. Our contentions, as there indicated, are that there was no proof that the coupons were the property of the United States, and no proof that the coupons had come into the possession of appellant in his fiduciary capacity as chairman of the War Price and Rationing Board; in other words, that the Government failed completely in its proof of the *corpus delicti* of the offense of embezzlement. If our position be correct, then, as was the situation in the case of *Ayers v. United States, supra*, appellant has been "convicted of an offense the evidence completely fails to show he had committed." We believe such error is grave enough to call for the application of the exception to the general rule. No claim is advanced by appellee that no motion was made, or that having been made it was not

properly excepted to, but appellee relies upon a defective assignment. As indicated in the cases cited hereinabove, our courts have considered the sufficiency of the evidence under the exception to the rule, even where no motion at all was made and where no assignment of any kind was presented.

The record on this appeal is very brief, and all of the evidence as set forth in the transcript is contained in only 30 pages [Tr. pp. 36 to 66, inclusive]. The failure of the appellee to prove the essential elements of the offense of embezzlement is so manifest from a cursory reading of this evidence that we do not believe such reading will impose a burden upon the court, even in the absence of a proper assignment of error, particularly since the specification of error as set forth in the brief and the argument thereon point out with particularity the error relied upon. Under the circumstances, we respectfully urge that the court in the exercise of its discretion apply the exception to the general rule and consider the error claimed by appellant, even if it be held to be defectively assigned.

In connection with appellant's Assignment No. 3 of the Assignment of Errors (App. Op. Br., p. 10 and pp. 19 to 36, Inc.), based upon the erroneous admission of evidence of other separate and distinct offenses not charged in the indictment, appellee suggests that this error has been defectively presented, but concedes that the court has the inherent right to notice such prejudicial error, and for that reason attempts to reply to appellant's argument on that assignment.

If this assignment be defective, it comes within the same category as that hereinabove discussed, and since this error also is so manifestly prejudicial to appellant's rights, we ask the court to apply the exception to the

general rule and consider it in the same manner as if it had been properly assigned. Again we suggest that such a course will work no hardship upon the court or upon counsel for the appellee. In the specification of errors (App. Op. Br., p. 10), appellant has set forth the details of this error, and in addition has supplemented the specification with an appendix attached to the brief, setting forth all of the testimony adduced with reference to the other offenses. This testimony is all contained in seven pages. It was given by one witness, was developed in chronological sequence and prior to the testimony concerning the offense charged in the indictment, and is so clearly segregated from the latter testimony that it can be readily followed even in the transcript itself. The point has been fully covered in the brief and supported by authority. Certainly the Government can not claim that it has been misled in this matter, since the question was raised and argued in the trial court, and only one witness, James P. Murray, testified to other offenses. This situation is somewhat similar to that present in the case of *Paris v. United States, supra,* where the court considered the error in the admission of testimony of other offenses, though no proper assignment had been made, basing its ruling upon the fact that the Government could not have been misled and that the case was of importance to the defendant, since it involved his imprisonment, and the deprivation of his liberty for a period of two years. Here, appellant has been sentenced to five years in the penitentiary.

As stated above in connection with this point, the Government recognizes the court's right to take notice of this prejudicial error, even if it be defectively assigned, and we believe that, under the circumstances, the interests of justice would be served if the court exercised that right in this instance.

II.

Reply to Appellee's Discussion of Appellant's Claim That the Court Erred in Admitting Evidence Offered for the Purpose of Proving Other Separate and Distinct Offenses Not Charged in the Indictment.

In our opening brief at pages 19 to 36, we discussed the erroneous admission of evidence of other offenses, and we thought we had made our position clear. However, a reading of appellee's brief on this point leads us to believe that counsel for appellee has failed completely to grasp the force of our contention, or, understanding it, is unable to answer it.

As pointed out in our opening brief, we contend that this evidence was inadmissible for the purpose of proving intent:

1. Because evidence of other offenses is admissible only when the intent accompanying the act is equivocal or doubtful, and in the instant case, if appellant did the act in the manner testified to there could be no question as to the intent with which it was done, and hence no need for evidence of other offenses; and

2. Because, even conceding the admissibility of evidence of other offenses in cases of this nature, the required proof of those offenses was not made by the Government in this case, that is, such offenses were not proved to the same extent as was necessary in the case of the offense charged, and were not proved by evidence which was "plain, clear, and conclusive."

At the outset, appellee suggests that we have not differentiated between evidence of facts which constitute some "legal offense" and facts which prove the commission of an exactly "similar offense." The implication

in that statement, we take it, is that while the facts in this case do constitute offenses committed by appellant, yet they do not constitute offenses similar to the one charged against appellant, and that, therefore such evidence is admissible. But counsel for appellee must have totally misconceived the principle underlying the admission of evidence of other offenses for the purpose of proving intent, or he would not have advanced such a contention, since it is only evidence showing offenses similar to that charged against a defendant which *is* admissible; if the offenses shown by the evidence be not similar, then they can not be used under any circumstances for the purpose of proving intent.

The only argument made by appellee in reply to our contentions on this point is contained in a paragraph on page 7 of appellee's brief, as follows:

> "It is the position of the appellee that it does not make any particular difference whether these instances referred to in the record constitute past completed offenses, or whether or not, as contended by appellant, evidence of this character must show 'that the proof of the latter offense must be plain, clear, and conclusive.' The instances complained of by appellant show a chain of connected acts between the defendant and the witness limited in point of time to their immediate conduct for a period of three months, and each particular act complained of shows that the defendant was misusing the coupons under his charge, namely in some instances giving them away without pecuniary gain and in others making an outright sale. This evidence shows plan, scheme, design, and was admissible in evidence as tending to prove the particular intent existing in the mind of the defendant at the time of the commission of the offense for which he stood trial."

The first sentence of that argument is wholly beyond our comprehension, and we are, therefore, unable to make comment thereon. In the balance of the paragraph appellee argues that the evidence shows that the appellant was misusing the coupons under his charge, in some instances giving them away without pecuniary gain, and in others making an outright sale, and that this evidence tended to prove the intent of appellant in connection with the offense charged. In other words, appellant concedes exactly what we have argued, that the Government introduced evidence of other purported offenses—misusing and giving away coupons, which is a criminal offense, and selling them outright, which of course would be either larceny or embezzlement; and appellee's only argument in support of the court's ruling admitting this evidence is contained in the last sentence of the above paragraph, where it is stated that this evidence was admitted "to prove the particular intent existing in the mind of the defendant at the time of the commission of the offense for which he stood trial." We find no supporting argument or authority, however, for this assertion. Appellee has failed to point out how or under what rule such evidence would be admissible to prove intent in this case, and we have carefully examined appellee's brief to see whether it contained any other or further argument in addition to that one sentence, but our search has been fruitless.

Nor has appellee answered our argument that the very evidence which he concedes was introduced, namely, misusing, giving away and selling the coupons, was not admissible because the intent with which the act charged was done was not equivocal.

Nor has appellee replied to our argument that the requisite proof of such other offenses was not made; that

the Government assumes the same burden in respect of such offenses as it does with reference to the offense charged; and such proof must be plain, clear, and conclusive, as charged by the court.

Under a heading, "Analysis of Cases Cited by Appellant" (Resp. Br., p. 8), appellee has attempted to analyze appellant's authorities cited in support of this assignment. We will briefly reply to this analysis.

Appellee states that there is no similarity between the facts in this case and those in the case of *Fish v. United States,* 215 Fed. 544, cited by appellant (Resp. Br., p. 8). The *Fish* case is cited on pages 23 to 25 of appellant's opening brief. We thought a mere reading of that case would be sufficient to indicate its applicability here; but so that there will be no question about it, we now point out that the decision therein is authority for our contention that the evidence of other offenses in the instant case was inadmissible because the intent was not equivocal or doubtful. In the *Fish* case it was held that if it was established that the defendant set the fire which was the basis of the charge in the indictment, there could be no doubt that the act of setting the fire was not accidental but intentional, and that, therefore, evidence of other offenses for the purpose of proving intent was inadmissible; and so here, if the evidence showed that appellant delivered 250 gasoline coupons to Murray and received $30.00 therefor, there was nothing equivocal about the intent with which the act was done, and the situation was the same as if intent were not an issue in the case, and hence the evidence of other offenses was inadmissible.

Appellee objects to our citing the case of *Boyd v. United States,* 142 U. S. 450 (Resp. Br. pp. 8 and 9) in support of our position on this point. We cited that case because it is the leading authority on the general

rule excluding proof of other offenses and on the prejudicial effect of the erroneous admission of such evidence.

Counsel for appellee states that he is at a loss to understand why we cited the case of *Hatchet v. United States,* 293 Fed. 1010 (Resp. Br. p. 10). As in the instance of the *Boyd* case, this authority was cited on the subject of the prejudicial effect of the erroneous admission of other offenses. In the *Hatchet* case, on the pretext of identifying the defendant the Government was permitted to show previous arrests, and that the defendant had a criminal record. There was no issue as to his identity, and hence such evidence was held to be inadmissible. Here, there was no issue of intent, as we have shown, since the intent was unmistakable, if it were established that appellant committed the act; and there being no question as to the intent, evidence of other offenses was inadmissible.

Appellee states that the case of *Paris v. United States,* also cited by appellant, does not support appellant's position. (Resp. Br., p. 11.) But even the quotations from said case, as set forth in appellee's brief, and appellee's own analysis of the case, shows clearly that that case is authority for our contention that the requisite proof of the purported similar offenses was not made. In the *Paris* case, the other evidence complained of involved the possession of morphine. The court held that the evidence was inadmissible because it failed to prove another offense, and in this connection said:

> "It is essential to the admissibility of evidence of another distinct offense that the proof of the latter offense be plain, clear, and conclusive. Evidence of a vague and uncertain character regarding such an alleged offense is never admissible."

And that is our position with reference to the evidence of other offenses erroneously admitted here; we claim that it was not plain, clear and conclusive and did not prove the essential elements of those other offenses.

The case of *Gart v. United States,* 294 Fed. 66, cited by appellant, is also not considered as authority by appellee (Resp. Br., p. 13). However, a glance at that decision will show that the court held that the evidence of a purported similar offense was inadmissible because the similar offense was not proved.

McLafferty v. United States, 77 Fed. (2) 715, cited by appellant, is summarily disposed of by appellee with the statement that "it fails to support the legal proposition contended for by appellant." (Resp. Br., pp. 13 and 14.) This is one of the strongest cases in support of appellant's contention with reference to the failure of proof of the other offenses, and even the excerpt from the decision as quoted on page 14 of appellee's brief clearly shows its applicability. In the case cited the defendant had requested an instruction to the effect that the Government must establish beyond a reasonable doubt that the acts of the defendant in issuing prescriptions other than those charged in the indictment were criminal. The trial court refused to give that instruction, and in reversing the judgment of conviction and holding that the trial court should have so instructed the jury, this court held other distinct offenses that the proof of the latter be plain, clear and conclusive; that it was necessary for the Government to show that the other prescriptions were connected with actual violations of law, and that evidence of a vague and uncertain character regarding such other offenses is never admissible.

At the risk of being considered repetitious, but so that the appellee may not be confused as to our position, we

again state that our objection to the evidence of other offenses is twofold:

1. That because the intent was not equivocal, the evidence was not admissible for the purpose of proving intent;

2. That even assuming such evidence admissible for the purpose of proving intent in a case of this nature, in the instant case the proper proof of such offenses was not made; that is, they were not established by proof "plain, clear, and conclusive" and beyond a reasonable doubt.

Under a heading entitled, "The District Court Did Not Err in Admitting over the Objection of Appellant Evidence of Similar Offenses" appellee presents no argument in support of the contention contained in that heading, but contents himself with citing three cases, none of which has any relevancy to the question in issue:

The first, *McNabb v. United States,* 318 U. S. 332, 87 L. Ed. 579, was a conviction for murder in which the admissibility of confessions improperly obtained was the issue before the court, and it was in connection with a discussion of that question that the Supreme Court used the language quoted by appellee on page 15 of appellee's brief. We do not understand why this case has been cited by appellee. Counsel for appellee states that he has refrained from answering the state court authorities cited by appellant for the reason that he is inclined to the view expressed by the court in the *McNabb* case (Resp. Br., p. 15), and it may be that appellee considers such case authority for the proposition that the federal court has its own rules of evidence and is not bound by the rules of evidence in the state courts. If this be what appellee contends, we can, of course, have no quarrel

with that rule. But we call the court's attention to the fact that most of our authorities cited are cases decided by the federal courts, including this particular court. While the decisions of a state court are not binding, yet they may be, and often are, persuasive, and they evidently have been so considered by those federal courts whose decisions we have cited upon the question of the erroneous admission of evidence of other offenses. For example, in the case of *Peru v. United States, supra,* and *Fish v. United States, supra,* state cases are cited and relied upon; and in the case of *McLafferty v. United States, supra,* this court states that cases from 44 American jurisdictions support the rule governing the admissibility of other offenses.

The second case cited by appellee under this heading is *Brand v. United States,* 79 Fed. (2d) 605, which deals with the admission of evidence of other stolen automobiles in a prosecution for transporting a stolen automobile. Appellee states that this case holds that the admissibility of evidence of other offenses is one which must always be decided by a trial court in a particular case (Resp. Br., p. 16). That statement of the court's duty, of course, is a truism which we can not contradict; but it does not mean, of course, that the court can willy-nilly, as it were, permit the introduction of such evidence without the necessary prerequisites being furnished both for its admission and its proof.

The last case cited by appellee, *Wolfson v. United States,* 101 Fed. 430 (Resp. Br., p. 17), simply states the rule that if evidence tends to prove the commission of an offense or tends to prove the intent with which the act charged was committed, the fact that the evidence shows the commission of another offense does not serve to exclude it. That, of course, is a statement of

a rule well settled, but it has no application to the situation here presented. As we have already pointed out, in the instant case we contend that the evidence of other offenses was inadmissible because this was not a case in which it was necessary to use such evidence of other offenses for the purpose of proving intent, since the intent was manifest from the commission of the act, and also that the requisite proof of such offenses was not made by the Government.

The final argument made by appellee in connection with this point appears under the heading, "The Court did not Err in Instructing the Jury Upon the Purpose of the Admission of the Evidence." Appellee states that the court fully and fairly instructed the jury on the subject of other offenses and sets out that portion of the court's charge in that connection. We would have no criticism of this instruction if evidence of other offenses had been properly admitted and proved in this case; but the evidence having been erroneously admitted, the court's charge thereon simply emphasized the error in its admission and aggravated the prejudice already resulting to the appellant by its admission. Whether the jury followed the court's instructions and considered such incompetent and irrelevant evidence for the purpose of proving intent, or whether it failed to follow those instructions and considered the evidence for some other purpose, appellant's right to a fair and impartial trial was substantially impaired.

We respectfully urge that the judgment of conviction be reversed.

AMES PETERSON,
WILLIAM B. BEIRNE,
Attorneys for Appellant.